II.

STATEMENT OF JURISDICTION

The petitioner seeks to invoke jurisdiction under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

III.
SUMMARY OF ARGUMENT

The respondent respectfully submits that certiorari should be denied for the following reasons:

1. The sole issue is one of local law and does not involve any semblance of a federal question.

2. The Supreme Court, as a matter of sound policy, is highly reluctant to forecast the ultimate decision of a state judiciary on a question of local law.

3. The mere conflict of decisions in the respective circuits as to a question controlled by state law, is not a reason for granting certiorari.

4. There is no conflict in decisions of the Third Circuit as alleged in the petition.

5. The petitioner has failed to show that the decision of the Circuit Court is clearly wrong and definitely conflicts with state decisions. On the contrary, the decision is fully consonant with the state decisions and well-defined state policy.

6. The petitioner has failed to cite a single authority or precedent in support of its prayer for certiorari.

IV.

ARGUMENT

1. The sole issue is one of local law and does not involve any semblance of a federal question.

It is conceded that the only legal question involved is the construction of the first sentence of Article XVI, Section 7 of the Pennsylvania Constitution. This is an exclusive matter for local decision since the United States Courts have always followed the decisions of the highest court of a state upon the construction of its own constitution and statutes: *State of Minnesota ex rel. v. Probate Court,* 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744; *Madden v. Kentucky,* 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 590; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835; *Sterling v. Constantin,* 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375; *14 Am. Jur. 313,* sec. 99.

Conversely, the decisions of the Supreme Court of the United States on the construction of a state constitution or on a subject of local law, are not binding on the state courts: *State ex rel. v. Meek,* 127 Ark. 349, 192 S. W. 202; *Ryerson v. Peden,* 303 Ill. 171, 135 N. E. 423; *State v. Aime,* 62 Utah 476, 220 P. 704.

The appellate judiciary of Pennsylvania has not hesitated to exercise its independent judgment in arriving at conclusions contrary to those of the Supreme Court of the United States: *Central Lithograph Company v. Eatmor Chocolate Company,* 316 Pa. 300, 309, 175 Atl. 697; *Rohrer v. Milk Control Board,* 121 Pa. Superior Ct. 281, 184 Atl. 133, 322 Pa. 257, 186 Atl. 336; *W. Pa. Hospital et al. v. Lichliter et al.,* 340 Pa. 382, 391, 17 Atl. (2d) 206.

Thus, at the very threshold, the court should hesitate to grant certiorari for the fundamental reason that the only issue presented is purely local in character and is beyond the realm of final determination by this court.

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2. The Supreme Court, as a matter of sound policy, is highly reluctant to forecast the ultimate decision of a state judiciary on a question of local law.

Since the only issue presented here is one of local law to be decided finally by the Pennsylvania Supreme Court, this court as a matter of sound policy will not assume to predict what the state decision should, or will, be. This reluctance has been evidenced even in cases where it was alleged that a state law violates the federal constitution. The sound considerations which support this policy have been reviewed quite recently in *Railroad Commission of Texas et al. v. Pullman Company et al.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971; and *City of Chicago v. Fieldcrest Dairies, Inc.*, U. S., , 62 S. Ct. 986, L. Ed. .

As stated by Mr. Justice Frankfurter in the Pullman case (501):

> "* * * These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. See Cavanaugh v. Looney, 248 U. S. 453, 457, 39 S. Ct. 142, 143, 63 L. Ed. 354; Di Giovanni v. Camden Ins. Ass'n, 296 U. S. 64, 73, 56 S. Ct. 1, 5, 80 L. Ed. 47. This use of equitable powers is a contribution of the courts in

furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013, 28 U. S. C. A. sec. 380; Judicial Code, sec. 24 (1), as amended 28 U. S. C. sec. 41 (1), 28 U. S. C. A. sec. 41 (1); 47 Stat. 70, 29 U. S. C. secs. 101-115, 29 U. S. C. A. secs. 101-115."

Mr. Justice Douglas, in the Fieldcrest Dairies decision, decided on April 27, 1942, reviewed the principles set forth in the Pullman case and again stressed the fact that in advance of a state decision, the Supreme Court would merely be forecasting and predicting rather than adjudicating (p. 988):

> "* * * Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois * * *"

This policy so clearly expressed and justified in the above cases where federal questions were raised, is applicable even with greater force, where, as here, there is no semblance of a federal question involved. As stated in *Rowley v. Chicago and N. W. Ry. Co.*, 293 U. S. 102, 104, 105, 55 S. Ct. 55, 79 L. Ed. 22:

> "* * * These contentions depend upon serious questions of Wyoming law which have not been decided by its highest court. This court is reluctant, in advance of decision thereon by the state courts of last resort, to construe state statutes of doubtful meaning or to decide other questions of state law as to which there may be substantial controversy."

This principle is supported by numerous decisions, typical of which are *Porter v. Investors Syndicate*, 287 U. S. 346, 53 S. Ct. 132, 77 L. Ed. 354; *Utah Power and Light Company v. Pfost*, 286 U. S. 165, 186, 52 S. Ct. 548, 76 L. Ed. 1038; *So. Ry. Co. v. Watts*, 260 U. S. 519, 43 S. Ct. 192, 67 L. Ed. 375; *L. & N. RR. Co. v. Garrett*, 231 U. S. 298, 34 S. Ct. 48, 58 L. Ed. 229.

Thus, the established policy of the Supreme Court calls for a denial of certiorari in this case where the only question raised is one of local law and where the precise question has not yet been passed upon by the state judiciary.

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3. The mere conflict of decisions in the respective circuits as to a question controlled by state law, is not a reason for granting certiorari.

One of the grounds for certiorari urged by petitioner is a conflict of decisions among the various circuits (brief, p. 10, et seq.). Since the various circuit courts wherein this question was raised were bound to follow the state interpretations of their own constitutions, and since the decisions of the various states are conflicting, it is inevitable that the circuit court decisions must also be conflicting. Even if the Supreme Court should grant certiorari and adjudicate this case upon its merits, the decision would not dissolve the conflict since the state constructions would continue to be conclusive within their respective domains and the federal courts would continue to be bound by the respective state constructions.

The Supreme Court has found recent occasion to reiterate that a mere conflict of circuits on a matter of state law is not a reason for granting certiorari since such action would not secure uniformity of decision. See *Ruhlin*

et al. v. New York Life Insurance Company, 304 U. S. 202, 205, 206, 58 S. Ct. 860, 82 L. Ed. 1290, in which the principle was thus stated by Mr. Justice Reed:

> "Had Erie Railroad v. Tompkins been announced at some prior date the course of this case might have been different. This court might not have issued a writ of certiorari. Rule 38 (5) of the Supreme Court Rules, 28 U. S. C. A. following section 354, indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that 'a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.' Since jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order 'to secure uniformity of decision,' Magnum Import Co. v. Coty, 262 U. S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. E. g., Aschenbrenner v. United States Fid. & G. Co., 292 U. S. 80, 82, 54 S. Ct. 590, 591, 78 L. Ed. 1137; Stroehmann v. Mutual Life Ins. Co., 300 U. S. 435, 440, 57 S. Ct. 607, 609, 81 L. Ed. 732. *As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari.* The conflict may be merely corollary to a permissible difference of opinion in the state courts * * *
>
> "No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. * * *" (Italics supplied)

Argument

4. There is no conflict in decisions of the Third Circuit as alleged in the petition.

Another ground for certiorari urged by petitioner is that the Circuit Court has interpreted the Pennsylvania Constitution "in a manner which is in conflict with the interpretation inferentially placed upon the same provision by the same court". (brief, p. 8) The petitioner argues that in the case of *Rahway National Bank v. Thompson National Bank et al.*, 7 F. (2d) 419, the Circuit Court of Appeals for the Third Circuit inferentially approved the petitioner's contention as to construction of the identical constitutional provision. It further argues that the same court in *Wood & Sons v. Southern Trust Company* and *Wood & Sons v. Robinson Roders Company*, 13 F. (2d) 367, in considering a "New York statute identical with the Pennsylvania constitutional provision" (brief, p. 9) decided the point favorably to the petitioner's contention. Petitioner then argues that the decision of the Circuit Court in this case conflicts with the two previous decisions, and therefore the Supreme Court should grant certiorari.

In the Rahway National Bank case, Judge Morris expressly stated that the question here involved was not being decided (p. 420). It is futile, therefore, to urge that the decision in the present case is in conflict with the determination in the Rahway case. In the Wood & Sons case, the petitioner acknowledges that the court was following the New York decisions on construction of the New York Constitution (brief, p. 9). The court was bound to follow the New York law since the matter was one governed by local decision. The decision in the Wood & Sons case, therefore, cannot be regarded as creating a conflict of decisions.

5. The petitioner has failed to show that the decision of the Circuit Court is clearly wrong and definitely contrary to state decisions. On the contrary, the decision is fully consonant with the applicable state decisions and well-defined state policy.

The petitioner recites three grounds for granting of certiorari. The suggested grounds of conflict among the various circuits and conflict in the same circuit have been heretofore discussed. The third ground stresses that the Circuit Court "has interpreted an important provision of the Pennsylvania constitution in a manner which is in conflict with the interpretation *inferentially* placed upon it by the state courts of Pennsylvania." (brief, p. 6) (Italics supplied) The very first statement in the brief following the title to this argument, is "The exact question here involved has never been ruled upon by the appellate courts of Pennsylvania." (brief, p. 6) By the very statement of this contention and the admission that the question has never been ruled upon by the appellate courts of the state, the petitioner admits failure to justify certiorari.

This asserted ground for certiorari is extensively discussed by Robertson and Kirkham in their treatise entitled "Jurisdiction of the Supreme Court of the United States". After reviewing a large number of records of certiorari proceedings, the authors state the following governing principle (p. 594):

> "* * * Nor will the writ ordinarily be granted upon a petition asserting an erroneous construction by the Circuit Court of Appeals of the provisions of an applicable state statute, where the decision of that court is not clearly wrong, and the petition fails to exhibit an authoritative decision of the state courts upon the precise point in controversy."

Under this principle, the petitioner has the distinct burden of establishing that the Circuit Court decision is clearly wrong and of exhibiting an authoritative decision of the state courts upon the precise point in controversy. The petitioner does not attempt to do either. It merely asserts that the decision of the Circuit Court is contrary to certain principles *inferentially* decided by the state courts. Rather than exhibiting an authoritative decision upon the precise point, the petitioner admits that there is no decision on the precise point.

It is further established that a mere showing that the state of local decisions creates a doubt as to the construction of a constitutional provision, is not sufficient ground for certiorari. The principle, as stated by Robertson and Kirkham is thus (p. 600):

> "* * * But where it is admitted that the local decisions are applicable and the only contention is that the Circuit Court of Appeals misunderstood them, it will take a very clear showing of error in this regard to warrant the writ. A mere showing that the state of the local decisions leaves the construction of the state statute or constitutional provision in doubt ordinarily is not enough: there is no reason in such cases for the Supreme Court to add its guess to that of the Circuit Court of Appeals in respect of a matter of which it is not the final arbiter."

The authors cite a number of cases supporting these principles, typical of which is *Franklin-American Trust Company v. St. Louis Union Trust Company*, 286 U. S. 533, 52 S. Ct. 642, 76 L. Ed. 1274. The question in that case related to the priority of bond issues of a local drainage district issued under authority of various Arkansas statutes. Construing these statutes and the Arkansas decisions, the Circuit Court reached its judgment according to its view as to the Arkansas rule. In view of the local

public importance of the issue, certiorari was granted upon a petition insisting that the Circuit Court decision was in conflict with an imposing array of Arkansas decisions. After argument, the writ was dismissed as improvidently granted since an examination of the local decisions disclosed no reason for supposing that the Supreme Court could have made a better guess at the Arkansas rule than had the Circuit Court of Appeals. Another case quite similar in nature and illustrative of the rule is *Aetna Life Insurance Company v. Braukman,* 293 U. S. 578, 55 S. Ct. 90, 79 L. Ed. 675.

The petitioner has utterly failed to make "a very clear showing of error". It is merely seeking to have the Supreme Court add its prediction to that of the Circuit Court with respect to a matter of which the Supreme Court is not the final arbiter.

A study of the decision of the Circuit Court of Appeals and the applicable laws and decisions of Pennsylvania establish not that the decision of the Circuit Court is clearly erroneous, but rather that it is wholly consistent with the Pennsylvania decisions. The constitutional provision involved in this litigation reads as follows:

> "No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void * * *"

It is undenied that in this case there was money "actually received" by the debtor corporation. There is no contention, moreover, that there was any "fictitious increase of stock or indebtedness". There was no fraud or artifice or bad faith involved. The transactions involving the loans from the bank to the debtor corporation and the pledging of the bonds were in the usual course of debtor's business. The proceeds of the loan were used in the

normal operations of the business. The Circuit Court reviewed the decisions of the Pennsylvania judiciary with regard to the purpose of the constitutional provision and was "the more persuaded" of the propriety of its decision since it is clear that this type of transaction was not intended to be prohibited (R. 22).

The petitioner, in urging that there is a conflict with the interpretation inferentially placed upon the constitutional provision by the state courts, refers to two decisions: *Wrightsville Hardware Company v. McElroy*, 254 Pa. 422, 98 A. 1052; *Miller v. Hellam Distilling Company*, 57 Pa. Superior Ct. 183. These cases were carefully reviewed by the Circuit Court (R. 21, 22) and were correctly held to support its decision. In the Wrightsville Hardware case, the Pennsylvania Supreme Court expressly held that bonds issued in payment of a pre-existing debt are not in contravention of the constitutional provision. In the Miller case, the Pennsylvania Superior Court held that a power to issue bonds by sale also includes the power to pledge the bonds and that bonds pledged for a loan less than their face value were not issued in violation of the constitutional prohibition. The Circuit Court reasoned that if a power to issue bonds for payment includes the power to issue bonds for pledge and if, as held in the Wrightsville Hardware Company case, bonds may be issued in payment of a pre-existing debt, then it naturally follows that bonds may be issued as a pledge for a pre-existing debt.

The petitioner, however, contends (p. 7) that the Miller case inferentially holds to the contrary. The record in that case, the pertinent portions of which were reviewed in our brief filed with the Circuit Court, expressly indicates that the bonds were pledged as collateral for a pre-existing indebtedness. The petitioner nevertheless asks the Supreme Court to ignore the record and segre-

gates certain isolated sentences from the opinion as support for the inference which it seeks to breathe into the opinion. The opinion of course must be read in the light of the record before the court, and when so read, it cannot be argued that there is anything therein which conflicts with the decision of the Circuit Court in this case. The court, in the course of its opinion in the Miller case, stated (p. 186):

> "* * * The constitutional provision was intended to prevent the jeopardizing of corporate property by an incumberance placed upon it *where no return, either in money or property, had been received by the corporation.* * * * The primary object of this provision was to secure a fair consideration to the company *before* the bonds passed from its control." (Italics supplied)

This language clearly indicates that the Superior Court deemed it of no importance that some of the bonds were pledged for a pre-existing indebtedness. The only criterion was whether a fair consideration had been received by the company *before* the bonds were pledged. In other words, the indebtedness being bona fide and real, and not fictitious, the pledge of the bonds could not be held invalid.

Not only is the Circuit Court decision supported by the very authorities which the petitioner relies upon as inferentially creating the conflict, but it is also supported by the policy of the Pennsylvania judiciary and Legislature as expressed in related subjects. For example, the Pennsylvania Supreme Court has always held that a mortgage given as security for a pre-existing debt is valid; *Ahl v. Rhoads et al.*, 84 Pa. 319; *Appeal of Ross*, 106 Pa. 82; *Manhattan Hardware Company v. Phalen*, 128 Pa. 110; 18 Atl. 428. It has also held that corporate stock given for past services is valid under the same constitutional

provision even where there was no pre-existing contract in existence: *Colonial Biscuit Company v. Orcutt,* 264 Pa. 40, 107 Atl. 315.

The Uniform Negotiable Instruments Law, which has been in effect in Pennsylvania since 1901, recognizes a pre-existing debt as value (Act of May 16, 1901, P. L. 194, sec. 25; 56 PS 62). The first general Corporation Law enacted after the Constitution of 1874 became effective, authorized corporations to hold stock of another corporation "as collateral security for a prior indebtedness." (Act of April 29, 1874, P. L. 73, sec. 12; 15 PS 1)

Moreover, the Pennsylvania Supreme Court, with respect to this particular constitutional provision, has expressly held that "this provision is not self-executing": *Bradford County Telephone Company et al. v. Young, Admr., et al.,* 329 Pa. 433, 436, 198 Atl. 96. There is no statute in Pennsylvania prohibiting the issuance of bonds in a manner contrary to the constitutional injunction. Although the Circuit Court did not comment on this feature of the matter, nevertheless, in determining whether the Circuit Court decision is clearly erroneous under Pennsylvania law, the Supreme Court might well consider this feature of the situation.

It is the contention of the petitioner that bonds can be validly issued by a corporation only in exchange for, and simultaneously with the receipt of, money or property. To so construe the meaning of the constitutional provision under consideration would enlarge the prohibition beyond its express language. The argument that money or property must be presently or contemporaneously received with the issuance of the bonds would result in the distortion of the plain phraseology adopted by the framers of the Constitution. Such strained construction would be diametrically opposed to the large number of Pennsylvania decisions laying down the rule that the

words used in the Constitution are to be understood in their usual and ordinary sense and that the courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent: *Keller v. Scranton,* 200 Pa. 130, 49 Atl. 781; *Gottschall v. Campbell,* 234 Pa. 347, 83 Atl. 286; *Hoffman v. Kline et al.,* 300 Pa. 485, 150 Atl. 889; *Busser et al. v. Snyder et al.,* 282 Pa. 440, 128 Atl. 80; *O'Connor v. Armstrong et al.,* 299 Pa. 390, 149 Atl. 655; *Commonwealth ex rel. v. Acker,* 308 Pa. 29, 162 Atl. 159; *Lighton et al. v. Abington Township et al.,* 336 Pa. 345, 9 A. 2d 609; *Busser et al. v. Snyder et al.,* 282 Pa. 440, 449, 128 A. 80.

It is respectfully submitted, therefore, that the Circuit Court decision is fully in harmony with the applicable decisions and policies of the Pennsylvania courts and legislature.

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6. The petitioner has failed to cite a single authority in support of its prayer for certiorari.

As stated previously, the petitioner asserts three grounds for certiorari: conflict with the interpretation inferentially placed upon the constitutional provision by the state courts; conflict in the same circuit; and conflict between the circuits. It is significant that the petitioner has not cited a single case with respect to the question of whether certiorari may be predicated upon the bases named. We respectfully submit that a review of the applicable authorities establishes that none of the grounds submitted is tenable. The petitioner has failed to show that the Circuit Court decision is clearly erroneous or that there is a definite authority to the contrary decided by the state Supreme Court. To the contrary, the decision is fully consonant with the state decisions and policies. There

is no conflict between decisions in the same circuit and the conflict among the circuits and state courts on a matter of local law is not a ground for certiorari. Furthermore, it is against the policy of the Supreme Court to decide a matter of local law before the state judiciary has adjudicated the point. Such a policy is well grounded since its avoids needless friction with the states and limits the functions of the Supreme Court to adjudication and determination rather than to mere prediction.

Wherefore, respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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